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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1469

JOANNE ERSKINE COSE, *Petitioner,*

v.

LEROY EDWARD COSE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

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March 12, 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. _____

JOANNE ERSKINE COSE, *Petitioner,*

v.

LEROY EDWARD COSE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

Petitioner Joanne Erskine Cose petitions for a writ of certiorari to review the judgment of the Supreme Court of Alaska.

OPINION BELOW

The divorce decree of the Anchorage superior court is unreported. (App. A, *infra*). The opinion of the Alaska Supreme Court is reported at 592 P.2d 1230

(1979). (App. B, *infra*). The original mandate of June 19, 1979, is unreported. (App. C, *infra*). The order denying the first petition for reconsideration is unreported. (App. D, *infra*). The order granting the second petition for reconsideration and affirming the original Alaska Supreme Court opinion is unreported. (App. E, *infra*). The supplemental mandate is unreported. (App. F, *infra*). The Alaska Supreme Court's December Activity Report discussing the purpose of the order granting the second petition for reconsideration is unreported. (Relevant pages are App. G, *infra*).

JURISDICTION

The judgment of the Alaska Supreme Court was entered June 19, 1979. The second petition for reconsideration was granted and the supplemental mandate affirming the original opinion issued December 20, 1979, specifically to extend the time for filing this petition for certiorari until March 19, 1980. (App.'s E, F, and G).[1] This Court's jurisdiction is invoked under 28, U.S.C. §1257(3).

QUESTION PRESENTED

Whether federal law prohibits the division of military retired pay in a divorce.

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[1] Petitioner originally requested from this Court an extension of time to file a petition for certiorari. That request was denied. Petitioner then requested the Alaska Supreme Court to grant the second petition for reconsideration and issue a supplemental mandate extending the time for filing this petition for certiorari. In an order that may be virtually unique since statehood, the Alaska Supreme Court granted the second petition and issued a supplemental mandate, thus extending the time for filing this petition for certiorari.

STATUTES INVOLVED

See Appendix H.

STATEMENT OF THE CASE

The parties were married on November 14, 1954, five months after Respondent commenced active duty with the U.S. Army. They filed for divorce September 16, 1974. Respondent retired as a lieutenant colonel July 1, 1975 after twenty-one years of active duty. The parties were divorced October 29, 1976.

The Anchorage superior court held Respondent's retired pay was divisible and awarded Petitioner one-half the $1,100 monthly payments, terminable upon either party's death.[2] App. B at 1-2, 592 P.2d at 1230-31.

Respondent appealed to the Alaska Supreme Court, asserting the retired pay was income and not divisible property. Citing *Wissner* v. *Wissner,* 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed. 424 (1950), and *Free* v. *Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed. 2d 180 (1962), he also argued that treating the retired pay as property interfered with the Congressional intent and was barred by Article VI, clause 2, the supremacy clause of the United States Constitution.

Finding no evidence that Congress intended retired pay to be divisible, the Alaska Supreme Court applied a presumption against divisibility. Relying on what it perceived to be the reasoning of *Hisquierdo* v. *Hisquier-*

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[2] The other property, relatively minor in value, was settled as per agreement between the parties. Respondent was awarded custody of the parties' two minor children and Petitioner was ordered to pay child support to be deducted from the military retired pay awarded to her.

do, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), the court held military retired pay could not be divided in a divorce.

REASONS FOR GRANTING THE WRIT

The writ should be granted for four reasons.

1. The Decision Below Conflicts With The Decisions Of The Highest Courts Of Other States And With The Only Reported Decision Of A Court of Appeals.

The highest courts of the following states have ruled that military retired pay is divisible in a divorce:

Arizona: *Czarnecki* v. *Czarnecki,* 123 Ariz. 466, 600 P.2d 1098 (1979).

California: *Henn* v. *Henn,* _____ Cal.3d _____, _____ P.2d _____, 161 Cal.R. 502 (January 29, 1980), In re *Fithian,* 10 Cal. 3d 592, 517 P.2d 449, 111 Cal.R. 369, cert. denied, 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 (1974).

Idaho: *Ramsey* v. *Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975).

New Jersey: *Kruger* v. *Kruger,* 73 N.J. 464, 375 A.2d 659 (1977).

New Mexico: *LeClert* v. *LeClert,* 80 N.Mex. 253, 453 P.2d 755 (1969).

Texas: *Busby* v. *Busby,* 457 S.W. 2d 551 (1970).

Washington: *Payne* v. *Payne,* 82 Wash.2d 573, 512 P.2d 736 (1973).

The only reported decision of a court of appeals also holds that military retired pay is divisible.

Bodenhorn v. *Bodenhorn,* 567 F.2d 629 (5th Cir. 1978) (applying Canal Zone law).

Intermediate courts of appeals in the following states have permitted division:

Illinois: *In re Marriage of Musser,* 70 Ill.App.3d 706, 27 Ill.Dec.240, 388 N.E.2d 1289, (1979).

Louisiana: *Swope* v. *Mitchell,* 324 So.2d 461 (La.App.1975).

Michigan: *Chisnell* v. *Chisnell,* 82 Mich.App. 699, 267 N.W.2d 155, appeal denied, _____ Mich. _____, _____ N.W.2d _____(1978), cert. denied _____ U.S. _____, _____ S.Ct. _____, _____ L.Ed. 2d _____ (1979).

The highest courts of the following states have prohibited division of retired pay.

Alaska: *Cose* v. *Cose, supra.*

Arkansas: *Fenney* v. *Fenney,* 259 Ark. 858, 537 S.W.2d 367 (1976).

Colorado: *Ellis* v. *Ellis,* 191 Colo. 317, 552 P.2d 506 (1976).

Since *Hisquierdo* was issued, a unanimous Supreme Court of Arizona and the Illinois Court of Appeals have distinguished it and permitted division of military retired pay. *Czarnecki* v. *Czarnecki, supra, In re Marriage of Musser, supra,* 388 N.E.2d at 1291-92. In January 1980 a unaminous California Supreme Court did likewise. *Henn* v. *Henn, supra,* 161 Cal.R. at 503-04. The conflict

between the case at bar and these cases is square and irreconcilable. Each case held *Hisquierdo* was not controlling and each permitted division of the military retired pay. *Hisquierdo,* if controlling, would have mandated the opposite result and, as in the case at bar, prevented division of the retired pay.

This court has denied certiorari in three cases holding retired pay is divisible. *In re Fithian, supra, Starren* v. *Starren,* _____ Cal.3d _____, _____ P.2d _____, _____ Cal. R. _____ (January 17, 1979), (apparently unreported), cert. denied, _____ U.S. _____, _____ S.Ct., _____ L.Ed. _____, 5 F.L.R. 2938 (week of September 25, 1979), and *Chisnell* v. *Chisnell, supra.* The case at bar is the first case to come before this Court holding military retired pay is not divisible.

This split among the states is particularly important because of the regularity with which military personnel are transferred. The dichotomy encourages forum shopping. Normally such a split is a matter of state law. However here there is a strong federal interest in uniform interpretation of the federal military statutes.

2. The Issue Presented Is Important And Recurring, Affecting Thousands Of Divorces Annually Across the Country.

As the above decisions reflect, this is an important federal question, arising almost exclusively in state courts. With the increasing number of divorces nationwide and the large number of retired servicemen, the issue arises with great frequency in all states.

In most cases, the ex-serviceman's retired pay is the largest single asset of the marriage (perhaps equalled only by the family residence). Moreover, retired pay

may provide the most ready source of cash for division at divorce. For these reasons the issue assumes paramount importance in many miliary divorces.

The issue is important even in divorces in which the serviceman is still on active duty. In some cases the serviceman already has over twenty years on active duty and his pension has already vested. In other cases, although the pension has not vested, state law permits division of the unvested retired pay. See e.g. *In re Marriage of Brown,* 15 Cal.3d 838, 544 P.2d 561, 125 Cal.R. 633 (1976).

Because of the thousands of divorces that will continue to be affected annually, the issue is of sufficient importance to warrant certiorari.

3. The Issue Presents Important Questions Concerning The Accomodation Of State and Federal Interests Under The Constitution.

The divisibility of federal retired pay presents important issues involving divorce law, an area almost entirely regulated by the states, and the distribution of federal remuneration, an area in which the federal government and Congress have important concern. Cf. *Hisquierdo* v. *Hisquierdo, supra,* 439 U.S. at 581 *et seq.* In that case this Court reaffirmed the rule that state law remains paramount in this field unless "Congress has 'positively required by direct enactment' that state law be pre-empted." 439 U.S. at 581.

The Alaska decision, by finding such pre-emption from Congressional *silence,* creates a new rule and, in effect, overrules *Hisquierdo* and the previous cases on which the rule was based. See *Wetmore* v. *Markoe,* 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390 (1904), *United*

States v. *Yazell,* 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). The Alaska decision presages increasing encroachment of federal law into this area. If the presumption is reversed and, as the Alaska court held, Congress is *presumed* to pre-empt unless the statute and history indicate to the contrary, this Court's rulings dating back nearly eighty years, plus much modern Congressional legislation will be reversed. Equally importantly the virtually unbroken policy of federal abstention in the domestic relations field will be overturned.

4. The Alaska Supreme Court Improperly Applied *Hisquierdo* v. *Hisquierdo* To Bar The Divisibility Of Military Retired Pay.

Hisquierdo focused on the Railroad Retirement Act of 1974, particulary 45 U.S.C. §231m, which provides:

> "notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . ."

This section was held to bar division of railroad retirement benefits and anticipation of them in the division of other marital assets.

Cose recognized there is no equivalent military retired pay statute when the court stated

> "The statutes are silent as to the rights of dependents of the retiree. . .
>
> "One searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce." 592 P.2d 1232.

From the absence of a statute and from the absence of an affirmative congressional intent permitting division, the Alaska court implied a Congressional intent to *prohibit* division of the retired pay. The authority for this conclusion was not *Hisquierdo* itself (th case was not cited for this proposition), but a 1973 pre-*Hisquierdo* law review article by a Sacramento superior court judge, Goldberg, "Is Armed Services Retired Pay Really Community Property?" 48 Cal.St.Bar J. 12 (1973).

Judge Goldberg's article proceeded from the premise that the supremacy clause will not permit division of federal military retirement benefits in a divorce unless the federal statute specifically allows it. In his examination of the federal military retired pay statutes, Judge Goldberg was unable to find any statute addressing the property division issue. He thus concluded retired pay is not divisible. The issue then is the consequence of federal silence.

Hisquierdo directly rejected the Goldberg-*Cose* approach, holding retirement pay *is* divisible unless the federal statute expressly prohibits division and such division is "sufficiently injurious" to the federal program to require non-recognition of the wife's asserted claim. 439 U.S. at 583.

There is no military retired pay statute similar to 45 U.S.C. §231m. The military testamentary annunity provisions cited by the Alaska court (10 U.S.C. §§1434(c), 1447-1455) have nothing to do with the retired pay itself, which belongs to the serviceman and terminates on his death. *Czarnecki* v. *Czarnecki, supra*. Nor is the military annunity anti-assignment clause (10 U.S.C. §1440) similar to 45 U.S.C. §231m. *Gorman* v. *Gorman*, 90 Cal.App.3d 454, _____, 153 Cal.R. 479, 482-83 (1979).

The army retired pay statutes under which Respondent received his benefits, 10 U.S.C. §§3911, 3929 and 3991, are silent on the divisibility issue, as is the legislative history. There was no basis therefore to presume Congress intended to prohibit divisibility.

The Alaska Supreme Court granted Petitioner's second petition for reconsideration (which was itself out of time) to extend the time to file this petition for certiorari. That was a most unusual order, possibly unique since statehood, enabling this Court to take the case and decide the issue. It is submitted that the Alaska court also thought the case is sufficient important to warrant review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Alaska.

Respectfully submitted.

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APPENDIX

APPENDIX A

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

JOANNE ERSKINE COSE, *Plaintiff*

v.

LEROY EDWARD COSE, *Defendent.*

Case No. 74-5894

Decree

THIS MATTER having come before this court, and Findings of Fact and Conclusions of Law having been entered,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the bonds of matrimony heretofore and now existing between the plaintiff and the defendant are hereby dissolved and held for naught.

2. That the plaintiff shall be awarded one-half (½) of the military retirement received by the defendant, payable as follows:

FIVE HUNDRED FIFTY DOLLARS ($550.00) per month, less ONE HUNDRED FIFTY DOLLARS ($150.00) representing this Court's assessment of her contribution to the support of the two minor children, to commence August 1, 1975. At the time the minor child Warren, reaches the age of nineteen (19) years the plaintiff's assessment for child support shall be reduced to ONE HUNDRED DOLLARS ($100.00) per month and that sum will be deducted from her monthly share of FIVE HUNDRED FIFTY DOLLARS ($550.00). When Kevin reaches the age of nineteen (19) years the plaintiff will be entitled to receive from the Defendant her full fifty (50%) share of that monthly retirement income at the rate of FIVE HUNDRED FIFTY DOLLARS ($550.00) per month until her death or the death of the defendant.

3. That the defendant shall be awarded the sole, care, custody and control of the two minor children remaining at home with reasonable and liberal visitation rights in the plaintiff.

4. That the plaintiff shall receive $0 toward her costs and attorney fees incurred in the prosecution of this action.

5. That the division of the remaining property, both real and personal, acquired during the course of the marriage, orally entered upon the record herein shall be adopted by this court as a full and equitable division of said property.

6. That the plaintiff shall have her maiden name of Erskine returned to her.

DATED AT Anchorage, Alaska this 20th day of October, 1976.

ELEN H. LEWIS
Judge of the Superior Court

APPENDIX B

SUPREME COURT OF ALASKA

LEROY EDWARD COSE, *Appellant,*

JOANNE ERSKINE COSE, *Appellee.*

JOANNE ERSKINE COSE, *Cross-Appellant,*

v.

LEROY EDWARD COSE, *Cross-Appelle.*

Nos. 3243, 3244

March 30, 1979

Allen L. Jewell, Hahn, Jewell and Stanfill, Anchorage, for appellant and cross-appellee.

Timothy M. Lynch, Abbott, Lynch, Farney and Rodey, Anchorage, for appellee and cross-appellant.

Before BOOCHEVER, C.J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, J.J.

Opinion

CONNOR, Justice.

The major issue in this appeal and cross appeal is whether in divorce proceedings military retirement pay is to be considered future income to the retiree or property divisible between the parties. Appellant Leroy Cose challenges the superior court's determination that his retirement pay was property acquired during his marriage to appellee and therefore divisible under AS09.55.210(6).

Appellant entered the United States Army in June of 1954 and on November 14, 1954 he and appellee Joanne Cose were married. After a marriage of twenty years, during which time appellant remained in military service as an officer, appellee filed a complaint for divorce on September 16,1974. On July 1, 1975, while the divorce was still pending, appellant was officially separated from the Army, having elected to

retire from active service. Thereafter, on October 29, 1976, the superior court entered a final decree of divorce. At the time, the court held that appellant's military retirement pay of $1,100 per month was divisible property and it awarded appellee one-half of the monthly payments until her death or that of appellant.[1] The court further ordered that their remaining property be divided in accordance with an agreement between them. Appellant was awarded custody of the couple's two minor children and appellee's request for attorney's fees was denied. In a cross-appeal, appellee asserts that the superior court abused its discretion in denying her attorney's fees.

Appellant Cose receives military retirement benefits pursuant to 10 U.S.C. §§3911, 3929, and 3991. Under these statutes, a regular or reserve commissioned officer in the Army may request retirement after 20 years of service and upon such retirement he is entitled to retirement benefits, or in the words of the statutes, "retired pay." Benefits are received monthly and are computed on the basis of the officer's years of service and his retired grade pay level. Under 26 U.S.C. §61(a)(11), they are taxable as ordinary income when received. Benefits terminate on the death of the retiree. The officer does not contribute to a retirement fund during the course of his service.

A number of courts have held that military retirement pay is property divisible upon divorce rather than income to the recipient. *E. g. Ramsey* v. *Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975): *In Re Marriage of Fithian,* 10 Cal.3d 592, 111 Cal. Rptr. 369 517 P.2d 449 (1974), *cert. denied,* 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 (1974); *Payne* v. *Payne,* 82 Wash.2d 573, 512 P.2d 736 (1973); *LeClert* v. *LeClert,* 80

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[1] The court also ordered that appellee contribute $150 per month toward support of the two minor children in appellant's custody. These support payments were to be deducted from appellee's share of the military retirement pay with a reduction to $100 per month when the first child reached age 19.

N.M. 235, 453 P.2d 755 (N.M. 1969); *Kruger* v. *Kruger,* 139 N.J.Super. 413, 354 A.2d 340 (1976), modified on appeal, 73 N.J. 464, 375 A.2d 659 (1977); *Mora* v. *Mora,* 429 S.W.2d 660 (Tex.Civ.App.1968). Those courts have reasoned that military retirement pay is neither a payment for present services nor a gratuity bestowed upon the employee by a beneficent employer. Rather, the pay constitutes compensation for past services and is part of the consideration earned by the serviceman. Thus retirement pay is considered an earned property right which accrues by reason of and in the course of the individual's years of military service. Therefore, to the extent that such benefits were earned during marriage, they are treated as property of the marriage and are divisible as such.

Other courts have rejected this reasoning and have held that military retirement pay is income to the recipient and not divisible property. *Ellis* v. *Ellis,* 552 P.2d 506 (Colo. 1976); *Fenney* v. *Fenney,* 259 Ark. 858, 537 S.W.2d 367 (1976). The *Ellis* court has emphasized that under 42 U.S.C.A. §659 such benefits cannot be garnished or attached except for alimony or child support payments; and that generally military retirement pay has no lump sum value, cash surrender value, loan value, redemption value or value realizable after death.

Appellant contends that the treatment of federal military retirement pay as divisible property interferes with the purpose of Congress in enacting the military retirement pay system and that such treatment therefore is prohibited by the supremacy clause of the United States Constitution.[2] He bases this argument in part on the United States Supreme Court's decisions in *Wissner* v. *Wissner,* 338 U.S. 655, 70 S.Ct. 398,

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[2] Article VI, clause 2 of the United States Constitution states in pertinent part:

> "This Constitution, and the Laws of the Unted States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the Untied States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

94 L.Ed. 424 (1950) and *Free* v. *Bland,* 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962).

In *Wissner,* a state court ordered the named beneficiary of life insurance proceeds under the National Service Life Insurance Act (38 U.S.C. §§801 *et seq.*) to pay half of the proceeds, as community property, to the deceased soldier's widow. The Supreme Court held that under the supremacy clause, the state order was invalid because the specific language of the Act, when read in light of congressional intent, gave the insured serviceman the absolute right to select the beneficiary of his choice. Therefore, state community property law could not be applied in conflict with this federal right. *Free* v. *Bland* dealt with a similar situation. There, petitioner Free had purchased United States Savings Bonds which were issued to "Mr. or Mrs." Free. Treasury regulations provided that when either co-owner of such bonds died, the survivor would become sole and absolute owner. Mrs. Free died, and despite the survivorship provision, the state court held that the principal beneficiary under her will was entitled to one-half of the bonds under community property principles. The Supreme Court reversed, holding that the supremacy clause invalidated state law which violated Mr. Free's federally created right of survivorship in the bonds.

Of major significance is the recent opinion in *Hisquierdo* v. *Hisquierdo,* _____ U.S. _____, 99 S.Ct. 802, 59 L.Ed. 1 (1979), which relates to benefits under the Railroad Retirement Act. In that case, the Supreme Court of California held that a railroad worker's anticipated benefits could be divided as community property, even though under the act the benefits for an employee's spouse terminate upon divorce, and the benefits are not assignable or subject to legal process except for paying child support or alimony obligations. The United States Supreme Court reversed, holding that to order the worker to pay a portion of his benefits would contravene the intention of Congress. It is the ascertainment of legislative intent that provides the solution to the problem.

Some clues as to Congressional intent can be gathered from the statutes and pertinent background materials. Although the statutes are silent as to rights of dependents of the retiree, they do include a method by which the serviceman can use a portion of his retired pay to purchase an annuity for his widow. 10 U.S.C. §§1447-1455. Under this plan only a widow, not a surviving ex-wife, is eligible for benefits. Moreover, when the wife can no longer be a beneficiary because of divorce, deductions from retired pay cease. 10 U.S.C. §1434(c). In the passage of the law setting up this plan, provisions which would have protected ex-wives were stricken from the law before its passage. 118 Cong.Rec.S. 29810-12 (1972). In this respect Congress purposefully excluded ex-wives from benefitting under the plan. One searches the statutes in vain for any indication that Congress has ever treated retired pay as property or has intended retired pay to be divisible upon divorce.[3]

In view of the legislative treatment of military retired pay and the decision in *Hisquierdo* v. *Hisquierdo, supra* we hold that armed forces retired pay is not property which is divisible upon divorce. Given the federal legislative treatment of military retired pay and the decision in *Hisquierdo,* we find it unnecessary to classify retired pay as income or property under state law. The federal Supremacy Clause prohibits application of state property settlement concepts relating to divorce proceedings to such military benefits regardless of our holding on this matter. Thus, we must reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

MATTHEWS, Justice, concurring

I believe that this case is controlled by *Hisquierdo* v. *Hisquierdo,* _____ U.S. _____, 99 S.Ct. 802, 59 L.Ed. 1 (1979), and therefore agree that the decision of the superior court

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[3] See Goldberg, "Is Armed Services Retired Pay Really Community Property?" 48 Cal. State Bar J. 12 (1973).

must be reversed. Except for that decision I would have found no federal pre-emption, in accord with such decisions as *Ramsey* v. *Ramsey,* 96 Idaho 672, 535 P.2d 53 (1975), and *In Re Marriage of Fithian,* 10 Cal.3d 592, 111 Cal.Rptr. 369, 517 P.2d 449 (1974).

As a matter of state law it is clear that retirement pay must be considered in dividing marital property. AS 09.55.210(6) requires that property acquired during marriage be divided "in the manner as may be just" and in so deciding we have consistently required consideration of the financial circumstances of each party. *E. g. Merrill* v. *Merrill,* 368 P.2d 546, 547-48 n. 4 (Alaska 1962); *Malone* v. *Malone,* 587 p.2d 1167 (Alaska 1978). Often the major asset of a retired military family is the husband's retirement pay. To award that to the husband and divide the remaining assets between husband and wife as if the retirement benefit did not exist is to ignore the husband's financial circumstances. It is also plainly unfair to the wife.

APPENDIX C

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee,*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant.*

TO: Superior Court of the State of Alaska, Third Judicial District at Anchorage.

Leroy Edward Cose filed an appeal from an order of the Superior Court, Third Judicial District at Anchorage, in Civil Action No. 74-5894 entitled, "JOANNE ERSKINE COSE, Plaintiff, vs. LEROY EDWARD COSE, Defendant." Joanne Erskine Cose filed a cross-appeal from the same order. The cases were considered on the briefs submitted. On March 30, 1979, the court filed its written opinion. Appellees' and Cross-Appellants' petition for rehearing and amended petition for rehearing was denied on June 18, 1979.

IT IS ORDERED:

1. The order of the Superior Court, entered October 29, 1976, is reversed and the case is remanded to the Superior Court for further proceedings consistent with the opinion filed March 30, 1979.

2. Apppellant/Cross-Appellee shall recover from Appellee/Cross-Appellant costs and attorney's fees as shown below:

Costs and Attorney's Fees

Filing Fee	$ 50.00
Duplicating Appellant's Brief	83.80
Duplicating Reply Brief	110.00
Attorney's Fee	200.00
Total	$443.80

WITNESS the Honorable Jay A. Rabinowitz, Chief Justice of the Supreme Court, State of Alaska, this 19th day of June, 1979.

Clerk of the Supreme Court
Robert D. Bacon

/s/ CONNIE STASKA
By: Connie Staska,
Chief Deputy Clerk

APPENDIX D

THE SUPREME COURT OF THE STATE OF ALASKA

File Nos. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant*

Order

(filed June 21, 1979)

On consideration of the petition for rehearing, filed April 3, 1979, and the amended petition for rehearing, filed April 5, 1979, and the notice of supplemental authority, submitted May 10, 1979,

IT IS ORDERED:

The petition for rehearing is denied.

Entered by direction of the court at Juneau, Alaska, on June 18, 1979.

Clerk of the Supreme Court

/s/ ROBERT D. BACON
Robert D. Bacon

Justice Boochever dissents in part from this order for the reasons stated in the attached memorandum.

cc: Justices
Counsel

BOOCHEVER, Chief Justice, dissenting in part from denial of petition for rehearing.

The petition for rehearing requests that we address the question of whether the court on remand may consider the right to retirement payments as a factor for determination of alimony. I do not construe *Hisquierdo* v. *Hisquierdo,* _____ U.S. _____, 59 L. Ed. 2d 1 (1979), as preventing consideration of the right to vested military retirement payments in determining whether alimony should be awarded to a spouse, and, if so, the amount of alimony. I, therefore, believe that the trial court is not foreclosed from such considerations upon remand. 42 U.S.C.A. §659(a) (Supp. 1979) expressly provides that moneys due from the United States to any individual including members of the armed services are subject to legal process for the enforcement of payments for alimony.

The petition for rehearing also refers to the fact that our opinion does not deal with the matter of attorney's fees raised in the cross-appeal. I would expressly indicate that upon remand, the question of attorney's fees should again be considered by the trial court.

APPENDIX E

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee,*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant.*

Order

Before: Rabinowitz, Chief Justice, Connor Boochever and Matthews, Justices. [Burke, Justice, not participating.]

On consideration of the request for reconsideration by the full court, filed October 24, 1979, and the request for oral argument, filed October 8, 1979,

IT IS ORDERED:

1. The request for full court reconsideration is granted. The clerk is directed to file the untimely second petition for reconsideration dated October 5, 1979.

2. The second petition for reconsideration is granted.

3. The request for oral argument on reconsideration is denied.

4. On reconsideration, the decision of the Superior Court is reversed and the case is remanded for the reasons stated in the opinion filed March 30, 1979, 592 P.2d 1230.

5. The clerk shall issue a supplemental mandate on the next business day in accordance with Appellate Rule 28.

Entered by direction of the court at Juneau, Alaska, on December 19, 1979.

Clerk of the Supreme Court

/s/ ROBERT D. BACON
Robert D. Bacon

Distribution:

Justices
Counsel
Linda Reser (Superior Ct. No. 74-5894 CIV)

APPENDIX F

THE SUPREME COURT OF THE STATE OF ALASKA

File No. 3243/3244

LEROY EDWARD COSE, *Appellant and Cross-Appellee,*

v.

JOANNE ERSKINE COSE, *Appellee and Cross-Appellant.*

SUPPLEMENTAL MANDATE

TO: The Superior Court of the State of Alaska, Third Judicial District at Anchorage.

Leroy Edward Cose filed an appeal from an order of the Superior Court, Third Judicial District at Anchorage, in Civil Action No. 74-5894 entitled, "JOANNE ERSKINE COSE, Plaintiff, vs. LEROY EDWARD COSE, Defendant." Joanne Erskine Cose filed a cross-appeal from the same order. The cases were considered on the briefs submitted. On March 30, 1979, the court filed its written opinion. Appellee and Cross-Appellant's petition for rehearing and amended petition for rehearing were denied on June 18, 1979. Appellee and Cross-Appellant was granted leave to file a second petition for rehearing on December 19, 1979, the second petition for rehearing was granted, and the written opinion of March 30, 1979, was reaffirmed on December 19, 1979.

IT IS ORDERED:

The order of the Superior Court, entered October 29, 1976, is reversed and the case is remanded to the Superior Court for further proceedings consistent with the opinion filed March 30, 1979.

WITNESS the Honorable Jay A.Rabinowitz, Chief Justice of the Supreme Court, State of Alaska, this 20th day of December, 1979.

Clerk of the Supreme Court
/s/ ROBERT D. BACON
Robert D. Bacon

APPENDIX G

ALASKA SUPREME COURT

Activity Report—December, 1979

During December, 1979, the Alaska Supreme Court determined the matters listed below:

* * *

VI. Petitions For Rehearing

3243/3244 Cose v. Cose. Motion to file untimely petition for rehearing granted, petition granted, and opinion (592 P.2d 1230) reaffirmed December 19. Procedure was requested by new counsel for the appellee to enable filing of timely petition for certiorari in the United States Supreme Court.

* * *

APPENDIX H

10 U.S.C. §3911 reads in relevant part:

"§3911. *Twenty years or more: regular or reserve commissioned officers*

"The Secretary of the Army may, upon the officer's request, retire a regular or reserve commissioned officer of the Army who has at least 20 years of service computed under section 3926 of this title, at least 10 years of which have been active service as a commissioned officer."

10 U.S.C. §3928 reads in relevant part:

"§3939. *Computation of retired pay: law applicable.*

"A member of the Army retired under this chapter is entitled to retired pay computed under chapter 371 of this title."

10 §3991

Chapter 371.—Computation of retired pay.

The monthly retired pay of a person entitled thereto under this subtitle is computed according to the following table. For each case covered by a section of this title named in the column headed "For sections", retired pay is computed by taking, in order, the steps prescribed opposite it in columns 1, 2, 3, and 4, as modified by the applicable footnotes. However, if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or the table in section 1401 of this title, he is entitled to be paid under the applicable formula that is most favorable to him. Section references below are to sections of this title.

Formula	For sections	Column 1 Take	Column 2 Multiply by	Column 3 Add	Column 4 Subtract
A	3883 3884 3885 3886 3913 3915 3916 3919 3921 3922 3923	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 3888 or 3927(b), whichever is applicable.[4]	Amount necessary to increase product of columns 1 and 2 to 50% of pay upon which computation is based.	Excess over 75% of pay upon which computation is based.
B	3911 3918 3920 3924	Monthly basic pay[2] of member's retired grade.[1]	2½% of years of service credited to him under section 1405 of this title.[4]		Excess over 75% of pay upon which computation is based.
C	3914	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]	10% of product of columns 1 and 2 for extraordinary heroism in line of duty.[5]	Excess over 75% of pay upon which computation is based.
D	3917	Monthly basic pay[3] to which member was entitled on day before he retired.	2½% of years of service credited to him under section 3925.[4]		Excess over 75% of pay upon which computation is based.

[1] For the purposes of this section, determine member's retired grade as if section 3962(c) did not apply and, for an officer who has served as Chief of Staff, compute at the highest rates of basic pay applicable to him while he served in that office.

[2] Compute at rates applicable on date of retirement.

[3] Compute at rates applicable on date of retirement, or if the member has served as sergeant major of the Army, compute at the highest basic pay applicable to him while he so served, if such basic pay is greater.

[4] Before applying percentage factor, credit a part of a year that is six months or more as a whole year, and disregard a part of a year that is less than six months.

[5] The Secretary of the Army's determination as to extraordinary heroism is conclusive for all purposes.